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IN THE

Supreme Court of the United States

OCTOBER TERM 1945—No. 1086

JULES E. PICCARD, on behalf of himself and for the benefit of and on behalf of the defendant, The Sperry Corporation, and all other stockholders of said defendant, The Sperry Corporation, who may be similarly situated,

Petitioner,

against

THE SPERRY CORPORATION, STANDARD CAPITAL COMPANY, J. CHEEVER COWDIN, THOMAS A. MORGAN, EDWARD ALLEN PIERCE, individually and as directors and voting trustees, etc., ALEXANDER B. ROYCE and JOHN SANDERSON, individually and as directors, etc., THOMAS B. DOE, individually and as officers, etc., and J. RUSSEL FORGAN, WRIGHT DURYEA and others, individually and as partners trading under the firm name and style of FIELD GLORE & COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Second Circuit.

REPLY BRIEF FOR PETITIONER

A. JOSEPH GEIST,
Attorney for Petitioner.

GEORGE E. NETTER,
HELEN M. WOLFSOHN,
of Counsel.

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REPLY BRIEF FOR PETITIONER

I

As to Defendants Field Glore & Company.

A. Field Glore was in a fiduciary relationship to Sperry.

Field Glore seek to escape from their fiduciary obligations by stating that the selling order to them as brokers was cancelled on September 19, 1935, and that the option agreement was not executed until September 25, 1935 (Brief, pp. 8, 9). This is a misconception of the facts.

Field Glore were concededly fiduciaries as brokers under the sell order. To accomplish their purpose to convert the sell order into the form of an option (656, 658, 660, 662), they agreed to give their principal's voting trustee, director and representative an unusually large participation in the profits, but failed to disclose that fact to their principal.

In the latter part of August or early September, while the sell order was still in effect and admittedly Field Glore were fiduciaries, Cowdin and Field Glore talked about a 50% participation and "came to an agreement on it very quickly" (445-454). The trial judge found that at the September 19 meeting, at which the Sperry directors authorized the cancellation of the sell order and approved the option agreement, Cowdin reasonably expected that the share of his company in the Field Glore profits would be approximately 50%, but falsely represented that the participation would be a small one (2632; Finding 26). Such participation, therefore, must have been arranged between Cowdin and Field Glore before the meeting, when Field Glore were concededly fiduciaries under the sell order. Field Glore violated their fiduciary obligation by failing to make full and true disclosure of the arrangement with Cowdin.

While they were admittedly fiduciaries, Field Glore arranged a deal with their principal's trustee, Cowdin. By that deal Field Glore received an option on the stock, and Cowdin was given a 50% share in the profits of the option, which was to be paid not to him, but to his corporation. As part of the same deal, the sell order to Field Glore as brokers was cancelled. All this was not fully and truly disclosed, but, on the contrary, Cowdin was permitted, by the negative action of Field Glore, to make a false representation as to the extent of his interest.

Duryea of Field Glore testified that the sell order "was converted into an option arrangement" (660) and that Field Glore "had been trying to get it in the form of an option" (662). He also testified "the principal problem of

both Cowdin and Armsby" "was trying to get the Board to agree on the concentration of the sale of the Curtiss-Wright stock in one place, and also to get them to agree to an option form of selling rather than what I considered the rather foolish method they had employed up to that time" (658). Cowdin advised the Sperry directors that "to get the best *services of a broker in doing the selling* such broker should have an option during the period" (2382; emphasis supplied).

Moreover, the option contemplated "resales" of the stock by Field Glore and a division of profits between Field Glore and Sperry (2226-2231). Field Glore charged brokerage commissions under the option agreement (2231, 544). That Field Glore and Sperry were jointly interested in the profits which would result from the resale of the stock was in itself sufficient to make Field Glore fiduciaries.

Silverman v. *Bob* (1st Dept.), 253 App. Div. 303, 2 N. Y. Supp. (2d) 121;
May v. *Hettrick*, 181 App. Div. 3, 167 N. Y. Supp. 966, aff'd 226 N. Y. 580.

B. Field Glore violated its fiduciary duty to Sperry and knowingly participated with Cowdin in the breach of his trust.

It was evidently the theory of the courts below that Field Glore's belief that Sperry knew and had approved of Standard Capital's participation was sufficient to exonerate Field Glore of any responsibility in the matter and that they were under no positive duty to see to it that full, fair and unequivocal disclosure was made to Sperry (2642, 2663; Finding 41a, Conclusion of Law 7). Petitioner contends, however, that on the admitted facts in this case Field Glore were charged with the positive duty of seeing to it that Sperry was fully and correctly informed. That is the crux of the case against Field Glore.

The courts below have created a dangerous precedent by fixing a low standard of conduct for Field Glore. Even the ethics of the market place have been violated, and

certainly the high standards heretofore established for fiduciaries and those dealing with fiduciaries have not been lived up to. This lowering of the bars, against which our great chancellors have heretofore eloquently warned, may result in a dangerous trend unless corrected by this court. (See *Meinhard* v. *Salmon*, 249 N. Y. 458, 464.) Hence, the extreme importance of this court taking jurisdiction.

Field Glore, knowing that Cowdin was Sperry's fiduciary, agreed to pay him a finder's or intermediary's commission (1312, 1475, 599) in the unusual amount of 50% of the profits resulting from the option which he obtained for them from Sperry. They agreed to pay this, not frankly and openly to Cowdin, but to his corporation, Standard Capital, which had "no responsibility or financial undertaking" in the matter (2484).

Even if Field Glore were so naive as to believe that Cowdin had fully disclosed to the directors the 50% participation in the name of Standard Capital, Field Glore were nevertheless aware that the true transaction was one which the Sperry directors as fiduciaries should not and could not approve.

> "Their act in so doing was within their corporate power, but the manner in which they exercised that power, and the amounts which they allowed, were such that their acts were in violation of their duties as fiduciaries." *Griffin* v. *Smith* (C. C. A. 7), 101 F. (2d) 348.

See also:

> *Landes* v. *Hart* (1st Dept.), 131 App. Div. 6, 115 N. Y. Supp. 337, quoted from at page 13 of our Brief in Support of Petition for Certiorari;
> *Keenan* v. *Eshleman*, 23 Del. Ch. 234, 2 Atl. (2d) 904.

Had Cowdin been acting for an individual principal, Field Glore might have been exonerated from responsibility if that principal had manifested either that he

knew all the facts or that he did not care to know them. However, the Sperry directors were themselves fiduciaries, not principals.

Moreover, there is nothing in the record to support the assertion that Sperry, or even its directors, manifested to Field Glore that it knew all the material facts. On the contrary, the record establishes that Field Glore did not believe that Sperry knew the essential fact that the participation by Cowdin's company was as much as 50% and was not a small participation.

Field Glore readily entered into the subterfuge whereby Cowdin took the 50% participation in the option profits, not in his own name, but in the name of his corporation, Standard Capital, of which Forgan of Field Glore was a director (454-457, 425). Although Field Glore knew that Cowdin, a director and voting trustee of Sperry, was acting for Sperry and was its sole representative, Forgan of Field Glore testified that Cowdin made it "very clear" that "so far as any profit was concerned" he brought the business to Field Glore "as an officer of Standard Capital" (455).

It was unnecessary for Field Glore to indulge in assumptions as to whether full disclosure had been made. They could have been assured of this by sending Sperry a letter stating that Standard Capital was getting 50% of the profits, as they did to the New York Stock Exchange; but they did not (Ex. 8; 2244-2245). Field Glore sent Standard Capital a copy of the letter to the Stock Exchange which was unnecessary, but did not send Sperry a copy, although they definitely should have done so in modicum discharge of their fiduciary obligation (2220, 2224, 604). Field Glore asked Cowdin whether he had any objection to their stating to the Stock Exchange what Standard Capital's interest was (1320-1321). Even the letter to the Stock Exchange did not disclose that Cowdin, the principal stockholder of Standard Capital, had represented Sperry in negotiating the option (2244-2245).

Although they wrote to the Stock Exchange, Field Glore connived at Cowdin's fraud on Sperry. Indeed, *the letter to the Stock Exchange is cogent evidence that Field Glore did not believe that Standard Capital's 50% participation in the profits had been disclosed to Sperry.* Field Glore specifically informed the Stock Exchange that "we propose to cede to Standard Capital Company an interest of 50% of our share of the net profits" (2244-2245); but were careful not to say that it had been disclosed to Sperry that the participation was 50%. In cautiously chosen language, they wrote merely that "We are advised that the fact that the Standard Capital Company may participate in our share of the net profits on this transaction has been communicated to the Board of Directors of Sperry Corporation" (2245).

The artful language of this letter is virtually an admission that Field Glore knew that Cowdin had not made full disclosure of his 50% participation. Indeed, even in their brief here respondents do not contend that Field Glore believed that Cowdin had disclosed to Sperry a participation of as much as 50% in its profits.

It is argued by respondents that Sperry's counsel told Field Glore's counsel that a proper disclosure had been made by Cowdin (Brief, p. 6). However, defendant Royce, counsel for Sperry, did not say what disclosure had been made and Field Glore's counsel did not say what were the facts which should have been disclosed, nor call attention to the important fact that the interest of Cowdin's company, Standard Capital, was in the abnormally large amount of 50% and not a mere small participation (1529-1531, 1537, 1541-1542, 2517).

II

As to Cowdin's Alleged Services.

Respondents' assertion that Cowdin rendered substantial services in the sale of Curtiss-Wright stock (Respondents' Brief, p. 2) is not supported by the record. The trial judge found merely that "Cowdin rendered some services in promoting the sale of the Curtiss-Wright stock" (2644; Finding 47). He also found that pursuant to a resolution adopted by the directors of the Sperry Corporation in September, 1934, Cowdin received a salary of $1,000 a month for services in connection with Sperry's investment in Curtiss-Wright stock; that Cowdin performed such services; and that the payments were discontinued by order of the board at the end of February, 1936 (2629; Finding 23). The resale of the stock under the option had been completed by February, 1936. Moreover, as also found by the trial judge, beginning the latter part of 1935 and continuing to the spring of 1936, there was a stock market boom in aviation stock, including Curtiss-Wright (2644; Finding 45). In the light of this boom, Cowdin's services in promoting the sale of the stock could not have been very important.

It is unmistakable on the record that the participation in the profits by Cowdin's company was an "originating" or "finder's commission" for procuring the option for Field Glore (1312, 599).

III

The Releases to Cowdin and Standard Capital Are Not Valid Corporate Acts.

While the interest of a director in a transaction with his corporation renders that transaction voidable, not absolutely void, the transaction nevertheless requires the valid action of a proper quorum of the corporation's directors. Sperry's charter specifically provides that a transaction with an interested director must be approved or ratified by the affirmative vote of a majority of the directors present at a meeting, who are not so interested (2654; Finding 66).

Respondents cite no authority holding valid a charter provision purporting to authorize an interested director to vote or be counted towards a quorum, nor have they refuted our showing that the universal rule is that an interested director may neither vote nor be counted towards a quorum (see Petitioner's Brief, p. 17).

None of the cases cited at page 14 of respondents' brief involved a charter provision purporting to authorize an interested director to vote or to be counted towards a quorum.

In the instant case the directors were all interested because of their possible liability for negligence in approving the original transaction without inquiry as to Cowdin's participation after they were put on notice, and their consequent desire to get the matter disposed of. It is no answer to this that the trial court held them not actually liable for negligence, because it was nevertheless to their interest to get the matter quickly and quietly out of the way to avoid any embarrassing claims against themselves.

Respondents also argue that a nominal stock interest is not disqualifying; but the authorities they cite do not support even that proposition (Respondents' Brief, p. 13).

We need not pause to consider it, because the stock interests of Morgan and Mrs. Sanderson, who each paid over $5,000 for the stock, were real, not merely nominal, and were sufficient to produce the conflict between self-interest and duty which the law prohibits.

Respectfully submitted,

A. Joseph Geist,
Attorney for Petitioner.

George E. Netter,
Helen M. Wolfsohn,
of Counsel.